

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BRUCE SHELTON,

Plaintiff,

vs.

STATE OF NEVADA, *et al.*,

Defendants.

Case No. 2:16-cv-01056-GMN-GWF

**ORDER AND REPORT  
AND RECOMMENDATION**

Application to Proceed *in Forma Pauperis* (ECF No. 1) and Screening of Complaint (#1-1)

This matter comes before the Court on Plaintiff's Application to Proceed *in Forma Pauperis* (ECF No. 1), filed on May 10, 2016. Plaintiff filed a Supplement (ECF No. 2) to his application on May 24, 2016.

**BACKGROUND**

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 against Defendants the State of Nevada, Zales Jewelry and Cliff Bennett. Plaintiff alleges that Defendant Bennet violated his 4th, 5th and 6th Amendment rights by testifying and identifying Plaintiff as the individual who was present at two Zales Jewelry locations that had been burglarized. Defendant Bennet's testimony was allegedly made without any actual proof. Plaintiff asserts that this testimony caused him to retain counsel who failed to file motions on Plaintiff's behalf, which ultimately led to Plaintiff being found guilty in state court of conspiracy, burglary and grand larceny.

**DISCUSSION**

**I. Application to Proceed *in Forma Pauperis***

Plaintiff filed this instant action and attached a financial affidavit to his application and complaint as required by 28 U.S.C. § 1915(a). Reviewing Plaintiff's financial affidavit pursuant to

1 28 U.S.C. § 1915, the Court finds that Plaintiff is unable to pre-pay the filing fee. As a result,  
2 Plaintiff's request to proceed *in forma pauperis* in federal court is granted.

## 3 **II. Screening the Complaint**

4 Federal courts must conduct a preliminary screening in any case in which a prisoner seeks  
5 redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C.  
6 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims  
7 that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek  
8 monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. §  
9 1915A(b)(1),(2).

10 In addition to the screening requirements under § 1915A, pursuant to the PLRA, a federal  
11 court must dismiss a prisoner's claims, "if the allegation of poverty is untrue," or if the action "is  
12 frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary  
13 relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of  
14 a complaint for failure to state a claim upon which relief may be granted is provided for in Federal  
15 Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under Section 1915(e)(2)  
16 when reviewing the adequacy of a complaint or amended complaint.

17 Review under Fed. R. Civ. P. 12(b)(6) is essentially a ruling on a question of law. *See*  
18 *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure  
19 to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support  
20 of the claim that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th  
21 Cir. 1999). In making this determination, the Court takes as true all allegations of material fact  
22 stated in the complaint, and the Court construes them in the light most favorable to the plaintiff.  
23 *See Warsaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations in a *pro se* complaint  
24 are held to less stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*,  
25 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (*per curiam*). While the  
26 standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide  
27 more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964–65  
28 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*, *See Papasan*

1 v. *Allain*, 478 U.S. 265, 286 (1986).

2 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the  
3 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal  
4 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims  
5 of infringement of a legal interest which clearly does not exist), as well as claims based on fanciful  
6 factual allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319,  
7 327–28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

### 8 **III. Instant Complaint**

9 42 U.S.C. § 1983 is the vehicle through which plaintiffs can seek redress for violations of  
10 rights secured by the United States Constitution and laws. In order to state a claim under § 1983,  
11 the plaintiff must show (1) a deprivation by the defendant of a right secured by the United States  
12 constitution or laws and (2) that the defendant deprived plaintiff of this right under color of state  
13 law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604 (1970); *Jacobson v.*  
14 *Tahoe Regional Planning Agency*, 558 F.2d 928, 941 (9th Cir.1977); *Barragan v. Landry*, 2008  
15 WL 873347, \*6 (D. Nev. 2008). Section 1983 states in relevant part:

16 Every person who, under color of a statute, ordinance, regulation, custom, or usage,  
17 of any State or Territory or the District of Columbia, subjects, or causes to be  
18 subjected, any citizen of the United States or other person within the jurisdiction  
19 thereof to the deprivation of any rights, privileges, or immunities secured by the  
20 Constitution and laws, shall be liable to the party injured in an action at law, suit in  
21 equity, or other proper proceeding from redress,....

20 42 U.S.C. § 1983.

21 As noted above, there are two basic elements that a plaintiff is required to allege to have a  
22 claim under § 1983. First, plaintiff must allege that someone has deprived him of a right  
23 guaranteed to him by the federal constitution. The second is that the person who deprived him of  
24 that right acted under color of state law. Once the plaintiff alleges that his federal civil rights have  
25 been violated, then a plaintiff must show that those rights were violated by a person acting under  
26 color of state law. This means that plaintiff must name a person as a defendant in the complaint  
27 and that person must have acted under what is called “color of state law.” Persons acting under  
28 color of state law typically include officials who in some capacity represent either the state, city, or

1 county government. *See Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961), *partially overruled*  
 2 *on other grounds by Monell v. Department of Social Services of City of New York*, 436 U.S. 658,  
 3 663, 98 S.Ct. 2018, 2021 (1978). For purposes of bringing a § 1983 claim, under relatively narrow  
 4 and specific circumstances, a “person” can also include a municipality such as a town, city, or one  
 5 of its bodies such as the police or fire department. *Monell*, 436 U.S. at 663.

6 **A. Section 1983 Does Not Apply to Private Conduct**

7 Section 1983 does not reach private conduct, regardless of how discriminatory or wrongful  
 8 it may be. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). Even involving cases  
 9 where there is extensive state funding and regulation of a private activity, “the mere fact that a  
 10 business is subject to state regulation does not by itself convert its action into that of the State for  
 11 purposes of the Fourteenth Amendment.” *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350  
 12 (1974); *see also Rendell-Baker*, 457 U.S. 830 at 842–43; *Morse v. North Coast Opportunities*, 118  
 13 F.3d 1338, 1340–41 (9th Cir. 1997). Only where “there is a sufficiently close nexus between the  
 14 State and the challenged action of the regulated entity” will the Court allow a defendant to be  
 15 subjected to a §1983 claim. *Id.* A “close nexus” exists only where the State has “exercised  
 16 coercive power or has provided such significant encouragement.” *Id.*, *see also Flag Bros. Inc. v.*  
 17 *Brooks*, 436 U.S. 149, 156 (1978). The Ninth Circuit has established a two part test to establish  
 18 whether or not an alleged infringement of federal rights is fairly attributable to the government: “1)  
 19 the deprivation must result from a government policy, and 2) the party charged with the deprivation  
 20 must be a person who may fairly be said to be a government actor.” *Sutton v. Providence St.*  
 21 *Joseph Med. Center*, 192 F.3d 826, 835 (9th Cir. 1999).

22 Plaintiff’s claims against Defendants Cliff Bennet and Zales Jewelry fail to establish the  
 23 basic elements needed to successfully posit a claim under § 1983. First, Plaintiff fails to state that  
 24 Defendants’ actions were the result of a government policy. In addition, for purposes of § 1983,  
 25 Defendants are private actors and are not deemed government officials acting under the color of  
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1 state law and Plaintiff has not argued otherwise.<sup>1</sup> As a result, Plaintiff has not alleged that his  
 2 constitutional rights were violated by a person acting under the color of state law and has therefore  
 3 failed to state a claim upon which relief may be granted under § 1983. However, the Court cannot  
 4 state with certainty that Plaintiff could never state a proper claim against Defendants. Therefore,  
 5 Plaintiff's complaint will be dismissed with leave to amend.

6 **B. States are not a "Person" for § 1983 Purposes**

7 States, and any governmental agency that is an arm of the state, are not a "person" for  
 8 purposes of § 1983. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997)  
 9 (states); *Howlett v. Rose*, 496 U.S. 356, 365 (1990) (state agencies); *Hale v. Arizona*, 993 F.2d  
 10 1387, 1399 (9th Cir. 1993) (en banc) (discussing both states and state agencies). Section 1983  
 11 lawsuits filed against states are legally frivolous because they are barred by the Eleventh  
 12 Amendment. *Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989) *superseded on other grounds*  
 13 *by statute as stated in Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc). Plaintiff lists  
 14 the State of the Nevada as a defendant in this case but provides no facts related to claims against  
 15 the state. Even if Plaintiff articulated facts against the State of Nevada, his claims are nevertheless  
 16 without an arguable legal basis and the Court will recommend that they be dismissed with  
 17 prejudice.

18 If Plaintiff elects to proceed in this action by filing an amended complaint, he is informed  
 19 that the court cannot refer to a prior pleading in order to make his amended complaint complete.  
 20 Local Rule 15–1 requires that an amended complaint be complete in itself without reference to any  
 21 prior pleading. This is because, as a general rule, an amended complaint supersedes the original  
 22 complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.1967). Once Plaintiff files an amended  
 23 complaint, the original pleading no longer serves any function in the case. Therefore, in an  
 24 amended complaint, as in an original complaint, each claim and the involvement of each defendant  
 25 must be sufficiently alleged. Plaintiff is advised that litigation will not commence upon the filing  
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 28 <sup>1</sup> Plaintiff states that Defendant Cliff Bennet is a "Regional Loss Prevention Manager" presumably for Zales Jewelry stores, which is also private entity.

1 of an amended complaint. Rather, the Court will need to conduct an additional screening of the  
2 amended complaint pursuant to 28 U.S.C. § 1915A. If Plaintiff fails to file an amended complaint  
3 or fails to cure the deficiencies identified above, the Court will recommend that the complaint be  
4 dismissed with prejudice.

5 Accordingly,

6 **IT IS HEREBY ORDERED** that Plaintiff's Application to Proceed *in Forma Pauperis* is  
7 **granted**. Plaintiff shall not be required to pay an initial partial filing fee. However, even if this  
8 action is dismissed, the full filing fee must still be paid pursuant to 28 U.S.C. § 1915(b)(2).

9 **IT IS FURTHER ORDERED** that the movant herein is permitted to maintain this action  
10 to conclusion without the necessity of prepayment of any additional fees or costs or the giving of  
11 security therefor. This Order granting *forma pauperis* status shall not extend to the issuance of  
12 subpoenas at government expense.

13 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915(b)(2), the Nevada  
14 Department of Corrections shall pay to the Clerk of the United States District Court, District of  
15 Nevada, 20% of the preceding month's deposits to Plaintiff's account (inmate #7011965), in the  
16 months that the account exceeds \$10.00, until the full \$350 filing fee has been paid for this action.  
17 The Clerk of the Court shall send a copy of this Order to the Finance Division of the Clerk's Office.  
18 The Clerk shall also send a copy of this Order to the attention of the Chief of Inmate Services for  
19 the Nevada Department of Corrections, P.O. Box 7011, Carson City, NV 89702.

20 **IT IS FURTHER ORDERED** that Plaintiff's Complaint be **dismissed** without prejudice  
21 with leave to amend. Plaintiff shall have until **February 24, 2017** to file an amended complaint  
22 correcting the noted deficiencies.

### 23 **RECOMMENDATION**

24 **IT IS HEREBY RECOMMENDED** that Plaintiff's claims against the State of Nevada be  
25 **dismissed** with prejudice for failure to state a claim upon which relief can be granted.

### 26 **NOTICE**

27 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be  
28 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has

1 held that the courts of appeal may determine that an appeal has been waived due to the failure to  
2 file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit  
3 has also held that (1) failure to file objections within the specified time and (2) failure to properly  
4 address and brief the objectionable issues waives the right to appeal the District Court's order  
5 and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153,  
6 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

7 DATED this 25th day of January, 2017.

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10 GEORGE FOLEY, JR.  
11 United States Magistrate Judge  
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